

## **6 Official Opinions of the Compliance Board 171 (2009)**

***Minutes – Content – Failure to include any information about topics considered beyond statutory language, violated Act***  
***Closed Sessions – Attendance – Compliance Board will not second guess public body’s exercise of discretion as to staff included during closed session absent evidence action was arbitrary and without apparent basis***  
***Compliance Board – Authority and Procedures – Complaint must explain in what manner public body violated Act***  
***Minutes – Record of closed session for administrative function – Required disclosures***

September 29, 2009

*Mr. David Martinci*

The Open Meetings Compliance Board has considered your complaints alleging that the Calvert County Board of Education (“County Board”) has violated the Open Meetings Act over an 18-month period by considering matters in closed sessions that ought to have been addressed in open meetings and by failing to comply with the Act’s procedural requirements.<sup>1</sup> We have taken the liberty of reordering the issues raised in your complaints for purposes of analysis.

For the reasons explained below, we find that the County Board’s past practice of reporting on closed meetings did not satisfy the disclosure requirements of the Act. However, we acknowledge the County Board’s recent actions intended to ensure compliance. We find no violations as to attendance at closed meetings or as to the June 2009 retreat. Nor do we find any violation as to the summary disclosure of items deemed by the County Board as administrative functions. We are unable to opine on certain matters addressed in the complaint, including issues involving school redistricting.

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<sup>1</sup>The complaint made allegations not only as to the County Board, but also as to the School Superintendent and the Calvert County Public Schools. However, as only the County Board is a “public body” governed by the Open Meetings Act, our opinion addresses only the allegations concerning the County Board.

**I**

**Reporting of Closed Sessions**

***A. Complaint***

Your complaint identified numerous closed meetings for which the County Board failed to properly report the topics discussed as part of publicly-available minutes. In some cases, you described the County Board's description of a closed session as mere "boilerplate" in that the minutes merely paraphrased the applicable statutory provision under which the meeting was closed. You also stated that the County Board failed to report in its minutes the required vote by which meetings were closed, as well as any action or vote taken during the course of the meetings.<sup>2</sup>

***B. Response***

In a timely response on behalf of the County Board, Dario Agnolutto, Esquire conceded that the County Board's past practice of reporting the topics discussed during closed sessions had not satisfied the standards articulated by the Open Meetings Compliance Board, and that additional detail is required, "though not so much as to compromise the integrity of the purpose of the [closed meeting]." According to the response, beginning with its May 19, 2009, meeting, the County Board intended to expand the level of detail it provides both in the statements prepared in closing a meeting and in the minutes that follow. Furthermore, the County Board indicated that it would correct its minutes for the past year. Included with the response were copies of proposed amendments to minutes that reflect the topics discussed during closed sessions for the dates in question.

The response also included copies of the statements prepared in closing the meetings as evidence that the County Board has, in fact, tracked the members' votes in support of closing the meetings. However, the topics discussed have been redacted because they included "too much detail" – that is, "confidential information related to the specifics of the matters discussed." According to the response, "[u]p to now, these [s]tatements had been used for the [c]losed [m]eeting minutes." As to the allegation that minutes failed to reflect actions

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<sup>2</sup>As to the allegations concerning inadequate minutes, the complaint specifically addressed closed sessions conducted on January 24, 2008, February 28, 2008, February 12, 2009, and February 26, 2009. However, the complaint made clear that items identified are simply illustrative of the County Board's practices.

taken, the response stated that no actions were taken. The proposed amendments to relevant minutes reflect that “[n]o votes were taken.”

### C. Analysis

When a public body closes a meeting under the Open Meetings Act, certain procedures must be followed both in advance of the closed session and subsequent to the closed session. The disclosure requirements are similar, but not identical, and both must be followed. 3 *OMCB Opinions* 202, 207 (2002).

In order to close a meeting, a majority of the public body must vote in favor of closure; this vote must occur during the same session and be open to the public. § 10-508(d)(1); 6 *OMCB Opinions* 127, 131 (2009).<sup>3</sup> Furthermore, the presiding officer is responsible for completion of a “written statement of the reason for closing the meeting, including a citation of the authority under [§ 10-508(a)], and a listing of the topics to be discussed.” § 10-508(d)(2)(ii). We have long held that merely repeating the statutory exception is inadequate. *See, e.g.*, 1 *OMCB Opinions* 20, 26 (1993). While the written statement is not expected to reveal sensitive information properly covered in closed session, the statement is to apprise the public of the basis for invocation of a particular exception. *Id.*, 1 *OMCB Opinions* at 25 - 26 (reciting “legal and personnel” matters as “reason” for a closed session insufficient); 3 *OMCB Opinions* 101, 103 (2001) (local school board’s listing “[n]egotiations” and “[p]ersonnel” as “topics to be discussed” failed to satisfy Act). This statement is to be publicly available at the time the public body proceeds into closed session. § 10-508(d)(4); 1 *OMCB Opinions* 13, 14 (1992).<sup>4</sup>

Subsequent to a closed meeting, a public body must disclose certain information as part of publicly-available minutes.<sup>5</sup> Specifically,

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<sup>3</sup>Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

<sup>4</sup>While no particular form is required, we encourage public bodies to use the form recommended by the Attorney General. *See Open Meetings Act Manual* App. C (6<sup>th</sup> ed. 2006). If completed adequately, the form will satisfy a public body’s disclosure obligation in advance of a closed meeting under § 10-508(d)(2)(ii).

<sup>5</sup>While the Act refers to minutes of a public body’s next open session, we have approved the practice of including the disclosure in the minutes of a public  
(continued...)

publicly-available minutes must include: (i) a statement of the time, place, and purpose of the closed session; (ii) a record of the vote of each member as to closing the session; (iii) the citation of the authority under the Act for closing the session; and (iv) a listing of the topics of discussion, persons present, and each action taken during the session. § 10-509(c)(2). Like the disclosure in advance of a closed session, merely paraphrasing the applicable statutory exemption statutory is insufficient. <sup>5</sup> *OMCB Opinions* 33, 35 (2006) (school board’s minutes revealing that closed session involved a “personnel matter” and “consult[ation] with counsel to obtain legal advice on pending litigation” insufficient).

Given the County Board’s concession, extensive analysis is unnecessary. We find that the County Board violated the Act to the extent its publicly-available minutes described closed sessions by simply parroting the statutory exception as the topic of discussion. However, we note that the descriptions in the proposed amended minutes provided by the County Board appear to satisfy the detail required by the Act and reflect the vote supporting closure. Although not required by the Act, we have commented favorably on the practice of public bodies indicating explicitly, when appropriate, that no action was taken. To the extent the County Board’s notation that “no votes were taken” is intended to serve this same purpose, it is responsive to the question as to whether the public body acted on any matter discussed.

## **II**

### **Attendance at Closed Sessions**

#### ***A. Complaint***

In connection with several closed sessions, the complaint noted that the minutes reflected that the stated purpose included “legal issues”; however, the County Board’s attorney was not listed as being in attendance. Conversely, as to one closed meeting, the complaint noted that the County Board’s attorney was present for two hours even though no legal issues were listed as being discussed.

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<sup>5</sup>(...continued)

session on the same date as long as the public is aware of the public body’s practice, recognizing that this practice makes the information available to the public earlier. *See, e.g., 3 OMCB Opinions* 264, 270 (2003).

The complaint also noted that several closed sessions included the Superintendent and numerous staff, “call[ing] into question who comprises a public body and is able to attend a closed session.”

***B. Response***

The response stated that, in addition to its outside general counsel, the County Board has other legal counsel that it consults from time to time. Furthermore, Deputy Superintendent Robin Welsh also serves as internal, staff legal counsel, and occasionally briefs the County Board on legal matters. On February 25, 2009, Ms. Walsh briefed the County Board on potential litigation as the result of a personnel incident, as reflected in the proposed amended minutes.

The response stated that the County Board’s general counsel was present at a closed meeting on October 9, 2008, because legal advice was necessary in evaluating applicants for an ethics panel related to pending ethics matters involving school personnel and another matter in litigation. The proposed amended minutes included with the response cites §10-508(a)(1)(i) and (ii), (7), (8), and (13) as the authority under which the session was closed.

Concerning the presence of the Superintendent and staff at closed meetings, the response stated that the County Board is not aware of any prohibition on staff attending a closed session. “In fact, the Superintendent’s staff members are essential to such meetings inasmuch as they are an extension of the Superintendent himself for the day-to-day administration of the school system.” As to a closed session held on February 26, 2009, the response noted that “[o]nly those individuals that were involved with the ... issues under discussion were in attendance.” The response went on to cite numerous Compliance Board opinions supporting the County Board’s position.

***C. Analysis***

A public body may close a meeting under § 10-508(a)(7) to “consult with counsel to obtain legal advice.” This exception “is a relatively narrow one, limited to the give-and-take between lawyer and client in the context of the bona fide rendering of advice.” 3 *OMCB Opinions* 16, 20 (2000). Thus, counsel must be in the room at the time. 1 *OMCB Opinions* 35, 37 (1993). However, a public body clearly is not limited to consulting with a single attorney.

According to the response, Deputy Superintendent Welsh, among other duties, serves as legal counsel to the school system and occasionally briefs the County Board on legal matters. There is nothing improper about the County Board meeting under § 10-508(a)(7) with an attorney employed by the school system under § 10-508(a)(7), as long as the discussion was, in fact, limited to the rendering of legal advice. *Compare 5 OMCB Opinions* 33, 40 (2006).

In terms of others present during closed meetings, we have recognized that a public body may not arbitrarily admit some members of the public to its sessions while excluding others. *3 OMCB Opinions* 202, 206 (2002). However, there is no reason why a public body cannot admit select individuals needed for its deliberations. In fact it would be unusual for a school board to meet without the superintendent present in that the superintendent is “executive officer, secretary, and treasurer of the county board.” Education Article, § 4-102(a)(1), Annotated Code of Maryland. A school board may choose to have counsel present at all its meetings, regardless of whether the need for legal advice is anticipated. Other high level staff might be routinely included. Other staff might be invited for portions of a closed meeting where the school board feels their presence is needed.

We will not second guess a public body’s exercise of discretion absent evidence that those included appear arbitrary and without any apparent basis for their inclusion. *Cf. 3 OMCB Opinions* 202, 207 (2002). Here, there is no evidence that the County Board abused its discretion in terms of who attended closed sessions.

### **III**

#### **Retreat**

##### ***A. Complaint***

In a supplemental complaint, you indicated your belief that the County Board violated the Open Meetings Act by conducting a retreat on June 15 and 16, 2009. Accompanying the complaint was an article about the retreat from the Calvert County Public Schools website.

##### ***B. Response***

According to the County Board’s response, the retreat was held at King’s Landing Park auditorium, about ten miles from the County Board’s central

office. The retreat was open to the public except for those portions eligible to be closed under the Open Meetings Act. Notice was given and minutes were kept. The County Board's position is that no violation of the Open Meetings Act occurred.

### ***C. Analysis***

Based on the County Board's response, the retreat was apparently conducted in accordance with the Open Meetings Act. In fact, the complaint never indicated how, in the complainant's view, the County Board violated Open Meetings Act. *See* § 10-502.5(b)(2); *see also* Compliance Board's procedures for filing a complaint, available at <http://www.oag.state.md.us/Opengov/Openmeetings/complaint.htm>.

## **IV**

### **Closed Administrative Sessions**

#### ***A Complaint***

The complaint listed numerous items considered during the course of several closed sessions. According to the complaint, "[v]ery few of the items ... warrant a closed meeting [under] the 14 [exceptions allowing] a meeting to be closed."

On February 26, 2009, at a 9:00 a.m. closed session, the complaint stated that closed session topics included the retreat location, a student incident, addition of a nurse, PE graduation requirements, and a request concerning NJROTC salaries. An 11:00 a.m. closed session, the same day, involved the posting of administrative posters, school supplies and fees, correspondence regarding a student transfer, and elementary school capacity. In the complainant's view, "[t]opics discussed, with the possible exception of a student incident, are covered by the Open Meetings Act."

#### ***B. Response***

The identified issues were not considered under the Act's §10-508(a) exceptions, prescribing reasons why a meeting may be closed. Rather, according to the response, these were matters that qualified as administrative functions. Thus, the Act did not require that they be handled in an open meeting.

**C. Analysis**

It appears that the minutes were misconstrued in that they were interpreted as reflecting matters considered under one of the Act's statutory exceptions under which meetings might be closed. In fact, the identified matters involved what, in the County Board's view, were "administrative functions." Subject to limited exceptions not relevant here, administrative functions are outside the scope of the Open Meetings Act. § 10-503(a)(1)(i).

Nevertheless, if a public body recesses a public meeting to consider, in closed session, a matter that qualifies as an administrative function, certain disclosures are required. Specifically, publicly available minutes must include "a statement of the date, time, place, and persons present ... and (2) a phrase or sentence identifying the subject matter discussed ..." § 10-503(c). The minutes appear to provide an adequate description of the items discussed.<sup>6</sup>

**V****Redistricting**

The complaint included several issues that can be summarized under the subject redistricting controversy. However, the County Board's response did not address issues related to the redistricting committee or process. According to the response, "because the matter is presently the subject of litigation ... discussion of the matter could compromise the litigation were it addressed at this time."

In light of the County Board's failure to provide any information, we lack a sufficient record to address these matters. *See* § 10-502.5(f)(2) ("An opinion of the [Compliance] Board may state that the Board is unable to resolve the complaint".)

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<sup>6</sup>Given the record before us, we decline to express any opinion as to whether each item, in fact, qualified as an administrative function. However, as to the breadth of matters that might come before a school board that qualify as administrative functions, *see* 3 *OMCB Opinions* 39 (2000), describing matters within the concept of the previously labeled "executive function"—now "administrative function" in the parlance of the Act.



**VI**

**Conclusion**

We find that the County Board's past practice of reporting on closed meetings did not satisfy the disclosure requirements of the Act. However, we acknowledge the County Board's actions intended to bring its practices into compliance. We find no violations as to attendance at closed meeting or the June 2009 retreat. Nor do we find any violation as to the summary disclosure of items deemed by the County Board as administrative functions. We are unable to opine on certain matters addressed in the complaint, including issues involving school redistricting.

OPEN MEETINGS COMPLIANCE BOARD

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